

64H.1.7: Vendors Making Internet Sales

(1) Statement of Purpose; Background, Outline of Topics; Effective Date.

(a) Statement of Purpose. The purpose of 830 CMR 64H.1.7 is to explain how the general sales and use tax jurisdictional standard set forth in M.G.L. chs. 64H and 64I applies to vendors making Internet sales, taking into consideration the relevant provisions of the U.S. constitution and federal law. 830 CMR 64H.1.7 includes an explanation of the circumstances under which certain Internet vendors with a principal place of business located outside the state are required to register, collect and remit Massachusetts sales or use tax as set forth in M.G.L. chs. 64H and c. 64I.

(b) Background.

1. General. A vendor that is engaged in making taxable sales in the commonwealth or that sells taxable tangible personal property or services for use in the commonwealth is subject to a sales or use tax collection duty when it is "engaged in business in the commonwealth" within the meaning of M.G.L. c. 64H, § 1 and meets the U.S. constitutional requirements. The provisions of M.G.L. c. 64H, § 1 are generally enforced to the extent allowed under the constitutional limits.

2. Dormant Commerce Clause. The provisions of M.G.L. c. 64H, § 1 are enforced to the extent allowed by the "physical presence" dormant Commerce Clause standard as set forth in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), where a state sought to impose a use tax collection duty on an out-of-state mail order vendor on sales of tangible personal property shipped into the state. Unlike the mail order vendor at issue in *Quill*, Internet vendors with a large volume of Massachusetts sales invariably have one or more of the following contacts with the state that function to facilitate or enhance such in-state sales and constitute the requisite in-state physical presence:

- a. property interests in and/or the use of in-state software (*e.g.*, "apps") and ancillary data (*e.g.*, "cookies") which are distributed to or stored on the computers or other physical communications devices of a vendor's in-state customers, and may enable the vendor's use of such physical devices;
- b. contracts and/or other relationships with content distribution networks resulting in the use of in-state servers and other computer hardware and/or the receipt of server or hardware-related in-state services; and/or
- c. contracts and/or other relationships with online marketplace facilitators and/or delivery companies resulting in in-state services including, but not limited to, payment processing and order fulfillment, order management, return processing or otherwise assisting with returns and exchanges, the preparation of sales reports or other analytics and consumer access to customer service.

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3. Due Process Clause. The provisions of M.G.L. c. 64H, § 1 are enforced subject to the limitations of the Due Process Clause of the U.S. constitution. *See Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In the instance of a vendor with a principal place of business located outside the state, due process generally requires that such vendor purposefully avail itself of the state's economic market. *See id.* The degree to which a vendor must purposefully avail itself of a state's economic market to meet the requirements of due process can be uncertain in the instance of Internet vendors with a principal place of business located outside the state. Therefore, 830 CMR 64H.1.7(3) sets a bright line threshold intended to reflect a level of purposeful availment at which the requirements of due process will be met in the case of such vendors.

4. Internet Tax Freedom Act ("ITFA"), Codified as Note to 47 U.S.C. § 151. ITFA contains certain prohibitions on state taxation of e-commerce transactions. Among other things, it prohibits discriminatory taxation of e-commerce transactions and prohibits a state from asserting jurisdiction over an Internet vendor on the basis of certain specific factors. 830 CMR 64H.1.7 is non-discriminatory because it asserts jurisdiction over all vendors (Internet or non-Internet) who have the contacts identified in 830 CMR 64H.1.7(1)(b)2.a. through c. and applies the same jurisdictional standards to all vendors (Internet or non-Internet) that are otherwise subject to tax. *See* 830 CMR 64H.1.7(3), (5) and (6). Further, 830 CMR 64H.1.7(3) does not assert jurisdiction based on the prohibited factors referenced in ITFA. *See* 830 CMR 64H.1.7(4).

(c) Outline of Topics. Following is a list of sections contained in 830 CMR 64H.1.7:

1. Statement of Purpose; Background; Outline of Topics; Effective Date;
2. Definitions;
3. General Rule;
4. Exceptions;
5. Non-internet Vendors;
6. Internet Vendors with Other Contacts;
7. Tax Returns and Payments;
8. No Limitation on Other Authority.

(d) Effective Date. 830 CMR 64H.1.7 is effective on September 22, 2017. The requirement that an Internet vendor register, collect and remit sales or use tax applies as stated in 830 CMR 64H.1.7(3).

(2) Definitions.

Commissioner. The Commissioner of Revenue or the Commissioner's duly authorized representative.

Content Distribution Network or CDN. A person that operates an organized network of servers and other computer hardware that is generally placed in geographically distributed data centers within close proximity to Internet users.

Cookies. Text data files generally used by an Internet vendor to enhance its customer sales. Cookies are stored locally on computers and physical communications devices of the customers of an Internet vendor when such customers visit the vendor's website for the first time and act to identify the customer on each subsequent visit.

Delivery. The method by which a vendor delivers tangible personal property or a service that it has sold to a customer, however effected, including through electronic delivery. A delivery includes a delivery made by the vendor itself, a related person or a contract party.

Delivery Company. An unrelated person who, pursuant to an agreement with a vendor, delivers tangible personal property or services sold by such vendor and may also provide additional services, including order fulfillment, order management, return processing, the preparation of sales reports or other analytics and consumer access to customer service.

Internet Vendor. A vendor that derives sales from transactions consummated over the Internet, whether such transactions are:

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- (a) completed on a website maintained or operated by the vendor itself, or a website maintained or operated by a related person or a person with which the vendor contracts, including a marketplace facilitator; and/or
- (b) fulfilled by a related person or a person with which the vendor contracts.

An Internet vendor, in addition to its Internet sales, may also derive sales from orders completed other than over the Internet.

Marketplace Facilitator. A person who, pursuant to an agreement with a vendor, facilitates sales by such vendor through a physical or electronic marketplace operated by the person, and engages:

- (a) directly or indirectly, through one or more related persons in any of the following:
 - 1. transmitting or otherwise communicating the offer or acceptance between a buyer and vendor;
 - 2. owning or operating the infrastructure, electronic or physical, or technology that brings buyers and vendors together;
 - 3. providing a virtual currency that buyers are allowed or required to use to purchase products from the vendor; or
 - 4. software development or research and development activities related to any of the activities described in 830 CMR 64H.1.7(2): Marketplace Facilitator(b), if such activities are directly related to a physical or electronic marketplace operated by the person or a related person; and
- (b) in any of the following activities with respect to the vendor's products:
 - 1. payment processing services;
 - 2. fulfillment or storage services;
 - 3. listing products for sale;
 - 4. setting prices;
 - 5. branding sales as those of the marketplace facilitator;
 - 6. order taking;
 - 7. advertising or promotion; or
 - 8. providing customer service or accepting or assisting with returns or exchanges.

Massachusetts Sales. All sales made by a vendor of tangible personal property or services delivered into the state, however consummated.

Online Marketplace Facilitator. A marketplace facilitator that facilitates sales through an electronic marketplace.

Otherwise Subject to Tax. Massachusetts sales or use tax jurisdiction over a vendor that is conferred by in-state contacts other than as referenced in 830 CMR 64H.1.7(1)(b)2.a. through c. For example, an Internet vendor with a principal place of business located outside the state might maintain inventory in the state or contract with an in-state representative (including a related person) that creates sales or use tax jurisdiction. Only a vendor that is not "otherwise subject to tax" is potentially subject to 830 CMR 64H.1.7(3).

Sales. Sales as defined in M.G.L. c. 64H, § 1, whether or not such sales qualify for a sales tax exemption.

Services. Services as defined in M.G.L. c. 64H, § 1.

Software. A set of coded instructions designed to cause a computer or other physical communications device or automatic data processing equipment to perform a task including, but not limited to, native or mobile applications (apps) that are downloaded and run on computers or other physical communications devices, and web applications or dynamic web pages in which the coded instructions, such as JavaScript, are downloaded, executed, and run on web browsers.

Tangible Personal Property. Tangible personal property as defined in M.G.L. c. 64H, § 1.

Tax. The sales tax imposed under M.G.L. c. 64H or the use tax imposed under M.G.L. c. 64I.

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Transaction. A sale of tangible personal property or a service. The transactions of an Internet vendor include all such vendor's transactions for tangible personal property or a service, however consummated, including transactions completed on a website operated by:

- (a) such vendor;
- (b) a related person; or
- (c) a contract party, including a marketplace facilitator.

Vendor. A retailer or other person selling tangible personal property or services, the gross receipts from the retail sale of which are required to be included in the measure of the tax imposed by M.G.L. c. 64H or c. 64I.

(3) General Rule. An Internet vendor with a principal place of business located outside the state that is not otherwise subject to tax is required to register, collect and remit Massachusetts sales or use tax with respect to its Massachusetts sales as follows:

- (a) For the period beginning October 1, 2017 through December 31, 2017, if during the preceding 12 months, October 1, 2016 to September 30, 2017, it had in excess of \$500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.
- (b) For each calendar year beginning with 2018, if during the preceding calendar year it had in excess of \$500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.

(4) Exceptions. 830 CMR 64H.1.7(3) does not apply if a vendor does not have any of the contacts referenced in 830 CMR 64H.1.7(1)(b)2.a through c. For example, 830 CMR 64H.1.7(3) does not apply in either of the following two circumstances:

- (a) 830 CMR 64H.1.7(3) does not apply if the vendor's only contacts with Massachusetts are that in-state customers may access a site on the vendor's out-of-state computer server. Further, the mere fact that in-state customers may access such site, without more, will not be considered a factor in determining a vendor's tax collection obligation. *See* ITFA § 1105.
- (b) A provider of Internet access service or online services (a "provider") is not deemed to be the agent of a vendor for purposes of determining the application of 830 CMR 64H.1.7(3) to such vendor solely as a result of:
 1. the display of such vendor's information or content on the provider's out-of-state computer server; or
 2. the processing of orders through the provider's out-of-state computer server. *See id.*

(5) Non-internet Vendors. The type of contacts referenced in 830 CMR 64H.1.7(1)(b)2.a. through c. will generally establish state sales or use tax jurisdiction in the case of a non-Internet vendor when the U.S. constitutional requirements are met. Thus, for example, a non-Internet vendor may be subject to sales or use tax jurisdiction based upon the in-state ownership or use of computer software or hardware, or the receipt of in-state services provided by a marketplace facilitator or delivery company. The jurisdictional analysis in these cases is a facts and circumstances test.

(6) Internet Vendors with Other Contacts.

- (a) Prospective Tax Periods. 830 CMR 64H.1.7(3) applies to Internet vendors with a principal place of business located outside the state that are not otherwise subject to tax. For tax periods commencing subsequent to September 22, 2017, however, an Internet vendor may be subject to tax other than by reason of the contacts referenced in 830 CMR 64H.1.7(1)(b)2.a. through c., in which case 830 CMR 64H.1.7(3) does not apply. For example, for purposes of illustration only, an Internet vendor with a principal place of business located outside the state might:
 1. own or maintain inventory or other property in the state; or
 2. contract with an in-state representative (including a related person) other than as referenced in 830 CMR 64H.1.7(1)(b)2.a. through c., and thereby create state sales or use tax jurisdiction.

In these cases, the Internet vendor is subject to tax on all of its Massachusetts sales for the tax periods in question.

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(b) Prior Tax Periods. An Internet vendor may have engaged in in-state contacts other than as referenced in 830 CMR 64H.1.7(1)(b)2.a. through c. during tax periods prior to September 22, 2017. In these cases, the vendor is liable for tax for such prior tax periods if:

1. the contacts created sales or use tax jurisdiction; and
2. the vendor did not collect and remit the tax. For example, for purposes of illustration only, an Internet vendor with a principal place of business located outside Massachusetts may have previously:
 - a. owned or maintained inventory or other property in the state; or
 - b. contracted with an in-state representative (including a related person) other than as referenced in 830 CMR 64H.1.7(1)(b)2.a. through c., and thereby created state sales or use tax jurisdiction. In these cases, the Internet vendor would have been subject to tax on all of its Massachusetts sales for the tax periods in question.

Such a vendor may seek to use the Department of Revenue's voluntary disclosure program for such prior periods.

(7) Tax Returns and Payments.

(a) Requirement to File Tax Return. An Internet vendor subject to 830 CMR 64H.1.7(3) must file a tax return in the form and manner prescribed by the Commissioner and pay the tax due for each calendar month on or before the 20th day of the following calendar month, whether or not the vendor must collect any other local or state excises. For applicable record retention requirements, see 830 CMR 62C.25.1: *Record Retention*.

(b) Payment of Tax. Tax must be paid by the vendor in the format and manner specified by the Commissioner at the time for filing returns as specified by the Commissioner.

(c) Interest. Any portion of tax that is not paid on or before the due date of the return will have added to it interest from the due date of the return to the date the tax is paid at a rate prescribed by M.G.L. c. 62C, § 32.

(d) Penalties. A vendor may be subject to penalties under M.G.L. c. 62C if it fails to:

1. timely file a return;
2. pay the required tax; or
3. file a return and/or pay the required tax in the format required by Commissioner. See 830 CMR 62C.33.1: *Interest, Penalties, and Application of Payments*.

(8) No Limitation on Other Authority. Nothing in 830 CMR 64H.1.7 shall be construed to limit or negate the Commissioner's authority to make adjustments as otherwise permitted under Massachusetts law.